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Supreme Court of the United States

October Term, 1968

No. 1287

ESSO STANDARD OIL S.A.,
Petitioner,

against

SS. GASBRAS SUL

and

A/S SOBRAL, as Owner of the SS. GASBRAS SUL,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GORDON W. PAULSEN,
Counsel for Respondents,
80 Broad Street,
New York, N. Y. 10004.

RICHARD G. ASHWORTH,
HAIGHT, GARDNER, POOR & HAVENS,
of Counsel,

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The petition fails to state any proper reason why this Court should exercise its discretionary review over the decision of the Court of Appeals. The first three questions presented, on which the petition is admittedly "based primarily" (petition, p. 2, footnote), boil down to the contention, demonstrably erroneous, that the Court of Appeals ignored "conceded" findings of the District Court. The final question, similarly inappropriate for review by this Court, contends, in effect, that in determining applicable foreign law adversely to the petitioner, the Court of Appeals should not have mentioned that it was not persuaded by petitioner's contentions.

Rule 19 of this Court states that a writ of certiorari "will be granted only where there are special and important reasons therefor." There are no such reasons in this case: the decision below is of interest only to the parties and rests on the particular facts of the case.

THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THIS CAUSE

I

The Court of Appeals did not reject unchallenged fact findings; on the contrary, the factual inference which the petitioner asserts to have been "conceded" was a central issue of the appeal.

The petition objects (pp. 8-9, 20, and see also 44a) to the Court of Appeals' rejection of the inference drawn by the District Court as to the meaning of a warning given to respondents' captain by petitioner's mooring master. This is, in the first place, a rather picayune point to ask this Court to review, and certainly of no interest to anyone but the parties concerned in this litigation.

In any event, there is no merit to petitioner's contention that this was a "conceded fact". In its brief to the Court of Appeals petitioner made the identical assertion, and respondents' reply brief in that Court unambiguously stated that this inferential conclusion by the Trial Court *was* one of the issues raised on appeal by respondents (appendix hereto, 2b-3b):

> "A fundamental error of the Court below was in construing the meaning of the advice given to Captain Dahle by Esso's Mooring Master, Captain Jensen. * * * *Esso is in error in stating (Brief, p. 7) that no appeal has been taken from this conclusion on the part of the Trial Court.* Indeed, this is one of the central issues of this entire case,* namely the discretion given to the master of a vessel calling at Esso's sea terminal at San Jose, Guatemala." (Emphasis added)

The footnote (set forth in full in the appendix hereto, 3b) quoted the passage in appellant's main brief which objected to the Trial Court's holding on this specific issue.

As the petition itself concedes (p. 2, footnote), a statement in the brief on appeal *is* the proper way "to show the issues disputed on the appeal".

This issue was thus categorically raised in the brief and reply brief on behalf of appellant, dealt with in oral argument, and properly ruled upon by the Court of Appeals—all in accordance with the "usual course of judicial proceeding". There is no basis to call for an exercise of this Court's power of supervision over the action which the Court of Appeals took on the basis of its "definite and firm conviction that a mistake was committed" (50a).

II

There is no conflict between the circuits.

The petition asserts (pp. 21-22) a conflict between the Second and Ninth Circuits as to whether a determination of negligence is reviewable as a question of law. However, it is unnecessary in the present case to decide whether there is such a conflict or whether negligence is a question of law, since the Courts of Appeals are in agreement that the fixing of a standard of conduct is a question of law, and the application of a standard to a set of facts is what the present case involves.

In *Rederi A/B Soya* v. *SS Grand Grace*, 309 F.2d 159, 163 (1966)—the case relied upon by petitioner in support of its claim of "an essential conflict"—the Court of Appeals for the Ninth Circuit quoted from its own earlier decision in *Pacific Tow Boat Co.* v. *States Marine Corp. of Delaware*, 276 F.2d 745, 752 (1960):

> " 'It is true that any determination as to negligence requires the testing of particular facts against a predetermined standard of conduct. The fixing of that standard is a jural act. To this extent a

> question of law is involved, and hence a conclusion of law is required, in any determination as to negligence. Nothing said in McAllister or in any of our previous decisions was intended to limit the scope of review in so far as the fixing of the applicable standard of conduct is concerned.' "

So in the case at bar, the Court of Appeals reversed the imposition of an absolute standard based upon the Trial Court's erroneous inference as to the warning given to the master of the Gasbras Sul (see Point I, *supra*). That standard of hindsight afforded no room for discretion on the part of the shipmaster. The Court of Appeals held that in fixing and applying such standard to the exercise of judgment by a shipmaster faced with a choice between alternatives, the Trial Court erred in "viewing each occasion retrospectively" and in not passing upon each instance of the captain's exercise of judgment "in the light of circumstances known at each of those times and what was reasonably foreseeable at each of those times" (37a). The Court of Appeals observed: "It does not become negligence because the decision he makes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong." (38a)

Even petitioner had to acknowledge that if "hindsight" were "involved in the 'application' of the standard of conduct to the facts", then "this application, of course, would be subject to review" as a question of law (petition for rehearing, 44a).

There is involved in the present case, therefore, neither a question of fact, nor even of negligence, but the legal question of whether the Trial Court erred as a matter of law in using hindsight in deciding whether the captain's actions amounted to negligence. The Courts of Appeals, and indeed this Court, are in complete agreement that where, as here, an appellate court concludes that the court

below applied an impermissable standard in determining the legal effect of the established evidentiary facts, it is obliged to set the determination aside, see, e.g., *Baumgartner* v. *United States*, 322 U.S. 665 (1944); *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F.2d 774 (2nd Cir.), cert. denied 385 U.S. 835 (1966); *Nolan* v. *Sullivan*, 372 F.2d 776 (3rd Cir., 1967); *Hicks* v. *United States*, 368 F. 2d 626 (4th Cir., 1966); *Davis* v. *Parkhill-Goodloe Company*, 302 F.2d 489 (5th Cir., 1962); *Galena Oaks Corporation* v. *Scofield*, 218 F.2d 217 (5th Cir., 1954); *Cordovan Associates, Inc.* v. *Dayton Rubber Company*, 290 F.2d 858 (6th Cir., 1961); *Spheeris* v. *C.I.R.*, 284 F.2d 928 (7th Cir.), cert. denied, 366 U.S. 944 (1961).

III

The petitioner's contentions as to burden of proof of foreign law create a semantic rather than a real issue.

The petition asserts in the fourth question presented (p. 3) that Rule 44.1 of the Federal Rules of Civil Procedure require the court to determine foreign law without regard to any "burden of persuasion respecting such foreign law". This contention, too, was urged by petitioner upon the Court of Appeals in its petition for rehearing and again in its petition for reconsideration of the decision of the Court of Appeals denying rehearing. In passing upon this contention the Court of Appeals stated simply, and correctly, that a plaintiff has "the task of persuasion that it has a good cause of action" (47a).

It is submitted that the petitioner has overlooked a vital point on the question of foreign law: the finding of the Trial Court (8a), not challenged by petitioner, that under the general tort law of Guatemala the basis for

liability is negligence. Petitioner contended that a statute known as the "Accident Law" (petition, pp. 5-6) *changed* the tort law of Guatemala.

The Court of Appeals considered the testimony, the Guatemalan cases cited to it, and the parties' briefs,* and reached the conclusion that the Accident Law did not change the law of Guatemala (38a). In its opinion denying the petition for rehearing the Court of Appeals again considered petitioner's contentions as to the Accident Law, stated that it was not persuaded that the Supreme Court of Guatemala would interpret the Accident Law in the manner contended for by petitioner, and accordingly rejected petitioner's contention that the negligence law of Guatemala was changed by the Accident Law (49a).

Surely there is no call for the exercise of this Court's power of supervision here. Certainly F.R.C.P. 44.1 should not be read to forbid a Court of Appeals to observe that it is "not persuaded" by the arguments advanced by an advocate of an unusual statutory interpretation, particularly where, as here, the Guatemalan statute has never been so interpreted by the Guatemalan Supreme Court (38a, 47a-49a) and the asserted interpretation is in conflict with the basic tort law of Guatemala as found by both the Trial Court (8a) and the Court of Appeals (47a).

Conclusion: Certiorari should not be granted.

It is submitted that there is no merit in this petition for certiorari. No important questions of law are involved, there is no conflict among the circuits, nor did the Court of

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* Petitioner summarizes its contentions as to the interpretation of the Accident Law at pages 11-12 and 26-29 of the petition. Respondents' position, as set forth in its reply brief to the Court of Appeals, is reprinted at pages 9b-16b of the appendix hereto.

Appeals depart from the accepted and usual course of judicial procedure. There is nothing here, no "special" or "important" reason—or, indeed, *any* reason—why this case should concern this Court.

Respondents urge that the petition be denied.

Dated: New York, N. Y.,
April 30, 1968.

Respectfully submitted,

GORDON W. PAULSEN,
Counsel for Respondents,
80 Broad Street,
New York, N. Y. 10004.

RICHARD G. ASHWORTH,
HAIGHT, GARDNER, POOR & HAVENS,
of Counsel.